Hope Electrical Corporation *and* International Brotherhood of Electrical Workers, Local Union No. 545. Cases 17–CA–20758 and 17–CA–21062

July 31, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On December 5, 2001, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed a brief answering the Charging Party's exceptions, and the Charging Party filed a reply brief. In addition, the Respondent filed cross-exceptions and a supporting brief, the Charging Party filed a brief answering the cross-exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision,[2] and to adopt the recommended Order.

The Respondent is an electrical contractor. In 1997, it signed a collective-bargaining agreement with the Union; the contract's term ran until May 31, 1999. The agreement had an interest-arbitration provision permitting either party to submit unilaterally a successor contract proposal to binding arbitration.

In the spring of 1999, the Union invoked the interest-arbitration provision prior to the expiration of the agreement. The arbitration panel imposed a successor collective-bargaining agreement, with a term from June 1, 1999, until May 31, 2002. The Respondent refused to comply with the new agreement. The Union filed suit in the United States District Court for the Western District of Missouri to enforce the agreement. On May 30, 2000, the court, in an unpublished order, enforced the interest-arbitration award, affirming that the Respondent was party to a valid agreement until 2002. The court did not address any issues under the National Labor Relations Act.

After the district court's ruling, the Union filed unfair labor practice charges against the Respondent. Subsequently, the complaint in the case before us issued, alleging that the Respondent violated Section 8(a)(5) and (1) by refusing to comply with the terms of the contract imposed by the interest-arbitration panel. The judge dismissed the complaint. We agree with his ruling, based on the following analysis.

The Board has held that interest arbitration is a nonmandatory subject of bargaining. Therefore, repudiation of a collective-bargaining agreement imposed through an interest-arbitration clause in a preceding collective-bargaining agreement does not violate Section 8(a)(5) and (1). See *Tampa Sheet Metal Co.*, 288 NLRB 322, 325–326 (1988), and cases cited there. As the Board stated in dismissing the relevant allegations, "the remedy for such a repudiation lies not with the Board, but with the courts in a breach of contract proceeding." Id. at 326. See also *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB 1095, 1098–1099 (1989).

The precedent set forth above is clear and well established. If, as is the case here, the matter at issue does not involve a mandatory bargaining subject, the Board cannot find an 8(a)(5) violation. See, e.g., *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971). Accordingly, we will dismiss the complaint.[3]

ORDER

The recommended order of the administrative law judge is adopted and the complaint is dismissed.

Lyn R. Buckley, Esq., for the General Counsel.
Martin M. Bauman, Esq. (Bauman & Bauman), of St. Joseph, Missouri, for the Respondent.
Michael G. Avakian, Esq. (Smetna & Avakian), of Springfield, Virgina, for the Respondent.
Charles R. Schwartz, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas, on August 16 and 17, 2001. The charges in the captioned cases were filed on July 14, 2000, and February

[1] In its cross-exceptions the Respondent argues that the judge erred in failing to admit into evidence R. Exh. 40 after it was identified at the hearing. It is apparent that the judge's failure to admit this exhibit was inadvertent, and accordingly, we deem it admitted and part of the record.

It is unnecessary to address the Respondent's other cross-exceptions in light of our dismissal of the complaint.

[2] We find it unnecessary to consider any of the judge's fact findings and analyses that relate to *Hope Electrical Corporation*, Case 17–RD–1506, a concurrent representation proceeding involving the Respondent and the Union. That proceeding was entirely separate from this unfair labor practice case, and thus no representation issues were before the judge for determination. In any event, the Regional Director for Region 17 administratively dismissed the petition in Case 17–RD–1506 on August 2, 2002, and the Board affirmed the dismissal by unpublished order on July 21, 2003. Accordingly, the views the judge expressed concerning the representation case are moot.

[3] Member Liebman acknowledges that *Tampa Sheet Metal*, supra, represents current Board law, and accordingly she concurs in the dismissal of the complaint.

12, 2001, respectively, by International Brotherhood of Electrical Workers, Local Union No. 545 (the Union). A complaint was issued on November 15, 20001, by the Regional Director for Region 17 of the National Labor Relations Board (the Board), and a subsequent consolidated complaint was issued by the Acting Regional Director on March 21, 2001. The consolidated complaint alleges violations by Hope Electrical Corporation (Respondent or Hope) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent, in its answer to the consolidated complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business located in St. Joseph, Missouri, where it is engaged in business as an electrical contractor. In the course and conduct of its business operations, the Respondent annually purchases and receives goods valued in excess of $50,000 from other enterprises located within the State of Missouri, which enterprises received these goods directly from points outside the State of Missouri. It is admitted and I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Board should refrain from applying contrary Board precedent and defer to the decision of the U.S. District Court for the Western District of Missouri that found an enforceable contractual relationship between the Respondent and the Union.

B. The Facts

The material facts are not in dispute. In 1996, the Respondent, a small nonunion electrical contractor, was targeted by the Union with an organizational campaign. The Union caused its members to apply for work as a group and, upon failing to become hired, filed related unfair practice charges. In 1997, the Regional Office, after determining that the charges were meritorious, issued a complaint alleging discrimination for failure to hire the union-member applicants.

In order to resolve this matter and avoid the expense of litigation, Lloyd Hope, president and owner of the Respondent, agreed to sign a letter of assent, thereby becoming party to a contract, known as the Inside Agreement, between the Union and NECA, a multiemployer association. The Inside Agreement extended by its terms from June 1, 1996, to May 31, 1999. On June 17, 1997, Hope signed the letter of assent binding the Respondent to the provisions of the Inside Agreement. At this point the Union had not been selected by any of the Respondent's approximately six employees; thus, the agreement entered into was a prehire construction industry agreement sanctioned by Section 8(f) of the Act. Also on June 17, 1997, Hope signed a Voluntary Recognition Agreement in which it was agreed that should the Union demonstrate by signed authorization cards that it represented an uncoerced majority of the Respondent's electricians and apprentices, the Respondent would immediately recognize the Union as the *majority* representative of the employees pursuant to Section 9(a) of the Act. Upon obtaining these agreements, the Union withdrew the aforementioned unfair labor practice charges against Hope.

The record evidence shows that thereafter union representatives and organizers attempted to persuade Hope's employees to become members of the Union. However, not one employee was interested in doing so. In fact, when Hope advised his employees that he had signed the Inside Agreement with the Union in order to settle the pending unfair labor practice complaint, and further advised them that they would eventually be required to become members of the Union pursuant to the contractual union-security clause, they immediately balked and voiced their objections.

The acknowledged spokesman for the employees was and continues to be Bill Pryor, an electrician. On September 8, 1997, less than 3 months after the Union and Respondent entered into the 8(f) agreement, Pryor, on behalf of himself and the other employees, filed a decertification petition[1] in Case 17–RD–1506 seeking to decertify the Union.[2/3] There is no contention that the decertification petition was promoted or encouraged by the Respondent. Pryor testified in this proceeding that no employees were interested in union representation and that all of the employees objected to Hope's entering into an agreement that would bind them against their will to union obligations.[4]

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[1] While such petitions are commonly referred to as "decertification petitions," in this instance, the terminology is somewhat misleading as the Union has never been "certified."

[2] The petition reflects that the unit consists of six employees. Attached to the petition is a statement, signed by five employees, as follows: "We the undersigned electrical workers of 'Hope Electric' do not want to be represented by the local Electrical Workers Union #545 St. Joseph, Mo."

[3] Pursuant to the language of the second proviso of Sec. 8(f), an 8(f) prehire agreement "shall not be a bar to a petition filed pursuant to section 9 (c) or 9(e)."

[4] Again, on March 3, 1999, Pryor filed a similar decertification petition, supported in writing by seven electricians; and in August 2000, Pryor filed a "UD-Withdrawal of Union Shop Authority" petition, supported in writing by six electricians who sought to "rescind the Union security agreement."

On November 14, 1997, 2 months later, the Union filed an unfair labor practice charge against the Respondent in Case 17–CA–19452 alleging that Hope had repudiated the Inside Agreement by failing and refusing to utilize its exclusive hiring-hall provisions, and by failing to secure apprentices from the apprenticeship committee, in violation of Section 8(a)(1) and (5) of the Act. The Regional Office issued a formal complaint against Hope in this matter on November 14, 1997. Thereafter, the Regional Office deferred the matter to the Joint Labor-Management Committee (Committee) under the Inside Agreement for resolution. For a reason not apparent in the record nothing happened thereafter, and there apparently was no resolution of this particular matter. Then, in February 1999, after the Respondent had given the Union notice of termination of the contract, the Union again presented the same matter to the joint Labor-Management Committee, this time with the additional allegation that Hope had failed to pay its employees the appropriate wages specified in the Inside Agreement. This time the Committee met on February 8, 1999, to consider the matter, and on April 15, 1999, issued a written decision finding that hope had violated the aforementioned terms of the Inside Agreement. Ultimately, Case 17–CA–19452 was dismissed by the Regional Office on June 12, 2000, following the U.S. District Court's enforcement of the Committee's award, infra.

Meanwhile, because of the pending unfair labor practice complaint, the foregoing election petitions were not processed by the Regional Office. This procedure is authorized by the Board's "blocking charge policy" which provides for the holding in abeyance of representation/election matters due to blocking unresolved unfair labor practice matters.[5] Thus, well-established Board law makes it clear that elections should not be held during periods when the employees' freedom of choice may arguably be compromised or influenced by alleged unlawful conduct of an employer.[6]

From September 1997 to the present, a time period of over 4 years, the employees have attempted to bring the matter to a vote but have been unable to do so. Throughout these 4 years there have been some 13 charges filed by the Union against Hope, some found to be meritorious.[7] However, it is clear that even if these subsequent charges had not been filed, the first charge filed by the Union on November 14, 1997, that was not dismissed by the Regional Office until some 2-1/2 years later, on June 12, 2000, would have continued to block the petitions filed by Pryor.

As early as December 16, 1997, Prior wrote to Representative Pat Danner for assistance, complaining that the employees have not been permitted to have an election, and further stating that the Union had been pressuring the employees through letters, phone calls, and visits on the job to sign up, but that the employees opted not to do so. Thus, Pryor states, inter alia:

> We have told them several times we are not interested in joining the union. We have listened to what the union has to offer including their benefit packages and wages, but we as the employees of Hope Electric like what our Company has to offer and we do not want to be represented by the union.[8]

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[5] However, as noted in chapter 10, sec. 800 of the Board's "An Outline of Law and Procedure in Representation Cases, Office of the General Counsel," dated September 30, 1999, "The blocking charge policy is not a per se rule." And two of the "four major exceptions" to this policy are the following: "*Where a fair election can be conducted notwithstanding meritorious charges,"* and *"Where significant common issues will be resolved by processing the representation case."* (Emphasis in original.)

[6] This presents a curious ambiguity when applied to the foregoing scenario: Thus, none of the Respondent's employees wanted the Union that had been imposed upon them over their clear opposition. And Sec. 8(f) of the Act as well as the Board's decision *in John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), make it clear that, as stated at p. 1385:

> When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e).

The Regional Office, by applying the blocking charge policy, apparently believed that in order for the employees to exercise their right to vote the union out, the Respondent had to first honor the contract, containing a union-security clause, which requires, inter alia, that the employees become members of the Union. This seems to put the cart before the horse. It is clear that the blocking charge policy is not automatic and that discretion may be exercised in this regard: "The Board also recognizes that there may be unusual and special situations which may impel the holding of elections in the face of unremedied refusal to bargain charges." *Big Three Industries,* 201 NLRB 197 (1973).

[7] In a lengthy June 1, 2001 letter to Senator Christopher Bond, infra, the Regional Director sets out the history of the matter, including the disposition of all of the charges filed by the Union: Following its initial aforementioned charge in Case 17–CA–19452 filed on November 14, 1997, the Union filed its next charge a year later, on December 16, 1998, alleging that Hope had unlawfully repudiated the union-security clause of the Inside Agreement in violation of Sec. 8(a)(1) and (5) of the Act; apparently no complaint was issued, but rather the matter was deferred by the Regional Office to the grievance and arbitration provisions of the Inside Agreement, and the Union withdrew the charge on September 16, 1999. The next series of charges were filed on March 9, July 22, and December 8, 1999. All of these charges involved a lawsuit filed by the Respondent against the Union in State court (Buchanon County, Missouri). The Union claimed the lawsuit was baseless and retaliatory in violation of Sec. 8(a) (1) of the Act. The Regional Office agreed and issued a consolidated complaint in these matters alleging violations of Sec. 8(a)(1) of the Act, and at the conclusion of a Board hearing Hope and the Union entered into a non-Board settlement agreement; accordingly, these cases were closed by the Regional Office on June 2, 2000. Shortly thereafter, on July 5, 2000, Pryor again requested that the employees' decertification petition be reinstated. Other charges, not referenced herein, were dismissed by the Regional Office or withdrawn by the Union.

[8] Pryor testified similarly at the hearing in this matter. There are many arguments to be weighed for and against union representation in the construction industry. Union wages and benefits are but two of many competing considerations, and it may be reasonably presumed that Pryor and his coworkers, all electricians who make their livelihood in the construction industry, are well acquainted with unions and benefits under union contract, and with the realities of becoming union or remaining nonunion. Here, they have decided that the Union is not what they want. Application of the Board's blocking charge policy

. . . .

This has been a hardship; causing mental anguish and distress to our families. After 6 months of being pressured by the union we don't know who to turn to for help.

On August 8, 2000, Pryor wrote a letter addressed to the Regional Director, with a copy to Senator Bond, signing it as "Employee's [sic] representative of Hope Electrical Corporation," inter alia, as follows:

We the employees at Hope Electric Corporation requested our **Petition 17-RD-1506,** from 8/8/97, to be reinstated by a letter we sent to you dated 7/5/00. This petition would allow us to vote on whether we wanted to become a Union shop or not. The NLRB reinstated our petition 7/6/00 and scheduled a hearing for Wednesday, July 19, 2000. The day before our hearing I was informed that our hearing had been postponed and later received a letter stating: **"IT IS HEREBY ORDERED** that the hearing herein, scheduled for Wednesday, July 19, 2000 be, and it hereby is, postponed indefinitely pending disposition of blocking charges." Without any explanation on what blocking charges are, or what they represent, the NLRB has taken away our right to be heard again. This is just not a fair labor practice, when the Union is heard and we are not. Will you please explain to me why we can't be heard and why we are not able to vote on whether we want to belong to the Union or not? It appears again that the Union has been using stall tactics to keep us from voting because they know the outcome will not be in favor of the Union and the results of the vote may be a major setback for them with the litigation in the courts they have with our employer. It's just not fair when a Union organization can force a company and it's [sic] employees to become part of something they have no interest in what so ever and the Unions appear to have the NLRB working on their side. It appears that the Local Union No 545 is doing everything in their power to drive Hope Electrical our of business instead of trying to help the employees better themselves. Everything the Unions are doing may be legal, but that does not necessarily make it right.

. . . . The Local Union No. 545 has informed us, that we owe indebtedness to this Union for dues, fees and/or equivalent payments and if this were not paid they would demand our employment at Hope Electrical Corporation to be terminated. How could we owe the Union dues when we have never agreed to belong to their organization or have even been given the chance to vote on this as a group?

. . . .

Mr. Sharp will you "please" help us? Enough is enough; our lives have been disrupted by the Unions long enough, since September 20, 1995 [sic]. We are employees of a small electrical construction company just trying to make a honest living. Will you "please" allow us a chance to be heard and have our vote on whether we want to belong to a Union organization or not. If the NLRB will not help us, do you know where we can obtain help from another resource? Can we hold our own election to vote on whether we want to be a Union shop or not, if we have a neutral party to monitor the election? Please tell us what our options are and if there is anyone out there that can help us? [Emphasis in original.]

The parties to this proceeding acknowledge that at no time has even a single employee of the Respondent desired union representation; that if an election were now held no employees would vote in favor of the Union; and that for a period of 4 years each and every one of the Respondent's employees, individually and on a frequent basis, have approached Hope and have told him that they cannot understand why they are not being accorded their rights under the Act to rid themselves of the Union.[9]

Currently, as will be explained below, the employees are being threatened by the Union with termination under the union-security provision of a successor Inside Agreement unless they pay back union dues.[10] The Union has requested that the Respondent terminate these employees for failure to become members of the Union and for failure to pay dues, and the Respondent has refused to terminate them. The Union's demand that the employees, who have been opposed to union representation from the beginning, pay these significant sums of money or face termination by the Respondent, has understandably caused the employees and their families continued anxiety and consternation, that is exacerbated by the Board's processes.

Prior to the expiration of the 1996–1999 Inside Agreement, Hope gave the Union timely notice of the Respondent's intent to terminate that agreement. After unproductive bargaining for a new agreement between Hope and union representatives, the Union invoked the interest arbitration provision of the 1996–1999 Inside Agreement which provides in essence that if the parties fail to successfully negotiate a successor agreement, either party may unilaterally submit the dispute to the Council on Industrial Relations (CIR) a jointly administered union-management arbitration panel, and that the CIR shall adjudicate the matter and its decision shall be final and binding. In other words, the Inside Agreement provides that the CIR may impose

implies a belief by the Regional Office that the employees' judgment on such matters should be deferred until such time as they received the wages and benefits under the Inside Agreement; only then should they be entrusted to exercise their judgment in an atmosphere free from undue influence. It is precisely this concept that was so frustrating to Pryor: As stated in his letters, he and the other employees were frequently solicited by the union representatives to join the Union, but they turned the Union down for reasons of their own; they simply did not want the Union despite the union wages and benefits.

[9] Pryor, as the persistent spokesman for the employees, has written numerous additional detailed and entreating letters outlining the situation to U.S. senators, congresspersons, the Attorney General of the United States, the President of the United States, news media, the Regional Director, and others, in order to obtain assistance and guidance and to perhaps cause the Regional Office to reevaluate and place the voting rights of the employees ahead of the Board's blocking charge policy that, as Pryor has maintained, favors the Union and overrides the desires of the employees. Moreover, Pryor has consistently kept Hope apprised of all such letters, activities and communications.

[10] Individual employees have been advised in writing by the Union that they each owe as much as about $4500 in back dues.

a nonnegotiated new successor agreement upon an unwilling party. The Union submitted the dispute to the CIR, and on May 18, 1999, the CIR imposed a successor Inside Agreement upon the parties extending from June 1, 1999, to May 31, 2002. The Respondent refused to execute or honor this new agreement.

Thereupon, on December 2, 1999, the Union filed a lawsuit in the U.S. District Court for the Western District of Missouri pursuant to Section 301 of the Act, 29 U.S.C. § 185,[11] to enforce both the aforementioned decision of the Committee that found contract violations under the 1996–1999 Inside Agreement, and the decision of the CIR that imposed a new successor 1999–2002 Inside Agreement upon the Respondent. On May 26, 2000, the district court sustained the Union's Motion for Summary Judgment, and in a 10-page written decision issued, inter alia, the following orders:

> ORDERED that the April 15, 1999 Labor-Management Committee is confirmed and that defendant is to comply with the said award in all respects. It is further
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> ORDERED that the May 18, 1999 CIR award is confirmed and that defendant is to comply with said award in all respects. It is further
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> ORDERED that defendant submit to an audit of its business records for the purpose of ascertaining defendant's liability from defendant's non-compliance with the Inside Agreement that defendant was ordered to implement in the CIR award.

The Respondent failed to comply with the district court's foregoing May 26, 2000 orders, and was found to be in contempt; however, on August 29, 2000, the Respondent did execute the new Inside Agreement pursuant to the district court's order enforcing the CIR award.[12] The Respondent has appealed the matter to the Eight Circuit Court of Appeals, and the court of appeals has entered an Order of Stay, apparently, insofar as this record indicates, on both the district court's underlying orders and its contempt order.

In a lengthy June 1, 2001 reply letter (infra) to U.S. Senator Christopher S. Bond, who inquired about the matter as a result of one of Pryor's various letters, the Regional Director for Region 17 of the Board details the extensive history of the situation beginning in 1997. The letter goes on to set forth the sequence of events following the district court's orders, inter alia, as follows:

> In a letter dated July 5, 2000, Mr. Pryor requested that his petition in Case 17–RD–1506 be reinstated. As all previous unfair labor practice cases against Hope had been closed, an Order Reinstating Petition issued on July 6, 2000, scheduling a hearing on the petition for July 19, 2000. However, on July 14, 2000, the Union filed a charge against Hope in Case 17–CA–20758, alleging that Hope had repudiated the union security clause in the current Inside Agreement, in violation of Section 8(a)(1) and (5) of the Act.[13]
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> Following a thorough investigation of the Charge in Case 17–CA–20758, this office determined that further proceedings were unwarranted. A letter dismissing the charge was issued on August 30, 2000. The letter stated, in part, that because Hope timely notified the Union of its intent to terminate the Inside Agreement at its May 31, 1999 expiration date, there was no enforceable contract under Section 8(a)(5) of the Act beyond that date. As a result, Hope was privileged to terminate the [1996–1999] contract even when an interest arbitration clause was contained therein, because the interest arbitration clause is a non-mandatory subject of bargaining. Further, because there was no enforceable contract under Section 8(a)(5) of the Act, Hope did not violate the Act by refusing to terminate it employees Bill Pryor, Larry Cogdill, Ralph Evans and Ralph Law.
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> Thereafter, the Union filed an appeal of the dismissal of its charge in Case 17–CA–20758 to the Acting General Counsel's Office of Appeals in Washington, D.C. On October 13, 2000, the office of Appeals, by letter, reversed the decision to dismiss the charge and sustained the Union's appeal. The Office of Appeals stated, "It was concluded that the Employer's unilateral repudiation of the union security provision of the collective bargaining agreement which was confirmed by the District Court raises Section 8(a)(1) and (5) issues warranting Board determination based on record testimony before an administrative law judge. Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate complaint absent settlement."[14]

In accordance with this instruction from the Office of Appeals the Regional Director issued the consolidated complaint herein: Case 17–CA–20758, filed on July 14, 2000, relates to the Respondent's failure to terminate employees for failure to fulfill their financial obligations to the Union since on or about June 26, 2000; Case 17–CA–21062, filed on February 12, 2001, relates to the Respondent's repudiation of the entire Inside Agreement since on or about August 12, 2000, by failing to pay appropriate wages and fringe benefits, by failing to make proper payroll reports, and by failing to adhere to the to the apprenticeship and hiring hall provisions. Thus, both of the cases under consideration herein deal only wilt the 1999–2002 Inside Agreement.

[11] Sec. 301 of the Act, in pertinent part, provides that, "Suits for violation of contracts between an employer and a labor organization . . . .may be brought in any district court of the United States having jurisdiction of the parties . . . ."

[12] Also, the Respondent has submitted business records to the Union for the audit ordered by the court. By letter dated October 10, 2000, the Union advised the Respondent that the Respondent owed back wages to its employees in the amount of $186,093.

[13] In this charge the Union alleged that the Respondent was violating Sec. 8(a)(5) of the Act by refusing its written June 26, 2000 request to terminate employees because they had not become members of the Union in accordance with the provisions of the new Inside Agreement imposed by the CIR and the order of the District Court.

[14] Neither the foregoing Regional Director's letter to the Union dismissing its charge, nor the Office of Appeals letter reversing the Regional Directors' dismissal, were introduced into evidence.

C. Analysis and Conclusions

Both of the cases that are the subject of the instant complaint allege that the Respondent, in violation of Section 8(a)(5) of the Act, has failed to comply with various provisions of the nonnegotiated 1999–2001 successor Inside Agreement unilaterally imposed by the CIR. In *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988), the Board determined that an employer does not violate Section 8(a)(5) of the Act by failing to comply with an agreement that was imposed by interest arbitration,[15] and the Board will dismiss unfair labor practice charges predicated upon such facts. This is why the Regional Director initially found no merit to the Union's charge and dismissed it, and, because there remained no unremedied unfair labor practices, undertook to process the employees' decertification petition(s) that had been pending since 1997.

This case presents the question of whether the Board, in this instance, should adhere to its principle of refusing to validate contracts imposed through interest arbitration, or whether, in deference to the intervening order of the district court enforcing the CIR award, the Board should defer to the finding of the district court that an enforceable agreement does in fact exist; and whether the Board should further find that by failing to adhere to the provisions of such agreement the Respondent is violating Section 8(a)(5) of the Act by its noncompliance.

Thus, as noted, the district court has found an enforceable agreement, while under the identical facts the Board would find no enforceable agreement. In *Tampa Sheet Metal*, supra, the Board reasoned as follows:

> *A. Refusal to Abide by NJAB Award*
>
> The issue is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the collective-bargaining agreement imposed by the NJAB pursuant to the expiring agreement's interest arbitration provision. We agree with the judge that the Respondent did not violate the Act as alleged. It is well settled that interest arbitration clauses are nonmandatory subjects of bargaining. In *Chemical Workers V. Pittsburgh Plate Glass*, 404 U.S.157 (1971), the Supreme Court held that a unilateral modification of a contract term is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." 404 U.S. at 185. The Court further held that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair-labor-practice proceeding." 404 U.S. at 188.
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> Because interest arbitration is a nonmandatory subject of bargaining, the Respondent's refusal to abide by the contract imposed by the NJAB amounted to a repudiation of a nonmandatory term in the expiring collective-bargaining agreement. Under *Pittsburgh Glass*, supra, such conduct is not a violation of Section 8(a)(5) and (1) of the Act. The remedy for such a repudiation lies not with the Board, but with the courts in a breach of contract proceeding. Indeed, the Union and the trust funds here have already obtained court decisions ordering remedies for the Respondent's conduct. Accordingly, we conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to abide by the contract imposed by the NJAB. [Footnotes omitted.]

The existence of an enforceable contract is critical to the issue of whether the Respondent's employees, who have refused to join the Union or otherwise pay fees to the Union, be terminated absent payment of substantial and likely prohibitive sums of money, or whether, in the alternative, the Union be voted out, the employees retain their jobs, and the 1999–2001 Inside Agreement be considered a nullity. See *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, 925 fn. 9, and 928 fn. 19 (1994) ("When the [union] lost the election, the contract imposed by the NJAB was voided, and the parties' 8(f) relationship came to an end. *Deklewa*, 282 NLRB at 385").

Urging deference to the district court, the General Counsel and Union argue in their briefs that the district court, with abundant expertise in such matters, is well suited to resolve contractual disputes between parties under Section 301 of the Act, where, according to the General Counsel, "the underlying controversy is primarily contractual."[16] However, the General Counsel also maintains that in the absence of federal contract enforcement the Board should continue following *Tampa Sheet Metal*; in other words, the General Counsel seems to be proposing that the issues herein may or may not amount to a violation of the Act depending upon which forum, the Board or a Federal court, asserts jurisdiction or issues its decision first.

Further, the General Counsel cites many Board cases holding that a *union* does not violate Section 8(b)(1)(A) or (B) of the Act by invoking the interest arbitration clause of a contract after an employer has withdrawn recognition, or by seeking federal court enforcement of an arbitration award imposing a successor contract.[17] However, these cited cases, demonstrating the Board's cautious approach in attempting to reconcile the Board's jurisdiction with the Federal courts' Section 301 jurisdiction, do not deal with a situation where, as here, there is a pending and unresolved decertification petition, and, in addition, a clear and unequivocal statement from all the effected employees that they do not want union representation. Indeed, in *Electrical Workers Local 666 (Stokes Electrical)*, 326 NLRB 453 (1998), enfd. 225 F.3d 415 (4th Cir. 2000), also cited by

[15] See also *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB 1095, 1098–1100 (1989) (it should be pointed out that at fn. 3 the Board notes that the union and employer have 9(a) relationship denoting that a majority of the employer's employees had voluntarily selected the union as their bargaining representative, rather than, as in the instant case, an 8(f) relationship where there has been no employee selection of the Union).

[16] The Sec. 301 jurisdiction of Federal courts over suits involving contract violations should be narrowly construed so as not to impinge upon the expertise of the Board in the collective-bargaining area. See *AVCO Corp. v. Auto Workers Local 787*, 523 U.S. 653 (1998).

[17] *Electrical Workers Local 113 (Collier Electric)*, 296 NLRB 1095 (1989); *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991); *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 (1994); *Sheet Metal Workers Local 102 (R & J Metal)*, 316 NLRB 382 (1995).

the General Counsel, it may be inferred that the Board would look at the matter differently if actual proof of loss of majority status was an underlying issue: "We therefore need not decide whether a different result would be warranted in this case had there been proof of an actual loss of majority support for the Union prior to its invocation of the interest arbitration clause," Id. at 457.

The district court issued its decision on May 26, 2000, prior to the time the Union filed the charges underlying the instant complaint. From a careful reading of the district court's decision it does not appear that it was presented with the issue of whether the underlying dispute in this matter is primarily contractual or representational; nor, in finding an enforceable contract, did it consider or distinguish the Board's contrary policy, enunciated in *Tampa Sheet Metal*, supra, finding such agreements to be subject to repudiation and, accordingly, that no violation of the Act occurs when an employer repudiates such an agreement. Further, it appears that these issues were not presented to the district court during the course of subsequent ancillary proceedings following its initial decision. Thus, the district court has not been called upon to consider the foregoing matters, including the significance of the rights of the employees under the Act as indispensable third parties to the viability of an agreement between the Respondent and the Union. Accordingly, it appears that deference to the district court under such circumstances is not obligatory or mandated by *collateral estoppel*, as there are questions before the Board in this proceeding that remain unanswered.

In *Electrical Workers Local 257 v. Sebastian Electric*, 121 F.3d 1180 (8th Cir. 1997), the Eighth Circuit, citing with approval *Plumbers Local 342 v. Valley Engineers*, 975 F.2d 611, 613 (9th Cir. 1992), stated:.

> In *Valley Engineers* the Ninth Circuit explained:
>
> Representational issues fall within the NLRB's primary jurisdiction. Thus, "[w]e have recognized repeatedly that courts must refuse to exercise jurisdiction over claims involving representational issues." This deference is rooted in both the superior expertise of the Board and the incompatibility of the "the orderly function of the process of judicial review" with initial district court consideration of representational issues.
>
> . . . .
>
> [T]he court should look at whether "the major issues to be decided . . . can be characterized as primarily representational or primarily contractual." Where "[t]he interpretation of the contract depends entirely on the resolution of the question of whom the union represents," the matter is "properly left to the Board." [Citations omitted.]

The Eighth Circuit found, however, in *Sebastian Electric*, supra, that the dispute was primarily contractual. The matter, according to the Eighth Circuit, involved four "small owner-operated electrical companies with few or no employees" (Id. at 1182.); it appeared that three of the companies never had any employees and the fourth never had a majority of employees who had authorized the union to represent them (Id. at 1184); and, in any event, the correct bargaining unit consisted of the employees of all of the employer signatories to the contract (Id. at 1185). In other words the employees, if any, of each of the four employers were part of a much larger multiemployer unit and therefore they were represented by the union regardless of whether a majority of them wanted union representation.[18] Accordingly, there was no underlying representational issue that effected the contractual issue.

Sebastian Electric, supra, should be contrasted with the facts in this mater. First, the Respondent is not a part of a multiemployer bargaining unit but is a stand-alone employer. The bargaining unit, as set forth in the complaint is:

> All journeymen electricians and apprentices employed by Respondent from its St. Joseph, Missouri facility, but EXCLUDING all office clerical employees, managerial employees and guards and supervisors as defined in the Act.

And of overriding importance is the fact that for the past 4 years, since September 8, 1997, the employees have been trying to invoke the Board's election procedures through the decertification petition in Case 17–RD–1506. Indeed, such a petition by its very nature raises a "question concerning representation," and this question concerning representation has remained viable from the time it was filed on September 8, 1997, to the present day. See *City Markets, Inc.*, 273 NLRB 469 (1984); *Nu-Aimco, Inc.*, 306 NLRB 978 (1992).

Both the General Counsel and the Union maintain that the decertification petition is no longer relevant to the issues presented here because the question concerning representation has been rendered moot by the order of the district court. Thus, they argue that throughout the history of this proceeding the Regional Office has correctly implemented the blocking charge policy[19]—initially, because of the pendency of a potentially meritorious unfair labor practice charge, and currently, because the Board should defer to the district court's finding of an enforceable contract despite the fact that Board law is to the contrary. Accordingly, they would apply the statutory scheme, under which the Board is charged with the duty to insure that collective bargaining and the voice of the employees is paramount,[20] in such a fashion as to now deprive the employees of

[18] Thus, they were not in a position to file a decertification petition because such a petition would have to be multiemployerwide.

[19] As noted previously, I disagree that the Regional Office has correctly exercised its discretion in applying the blocking charge policy; and I do not agree with the General Counsel's statement in her brief that "[t]hese employees' opposition to the Union may well be inspired and fueled by their Employer's refusal to bargain with the Union, and refusal to honor contracts." This is not a case where employees, having selected a union in the first instance, were then effectively deprived of such union representation or the benefits of a negotiated contract by their employer's unlawful conduct; clearly, under such circumstances a valid argument may be made for holding an election petition in abeyance. Here, however, 100 percent of the employees neither selected the Union nor wanted the Union or the union contract that was forced upon them by the Respondent; therefore, the fact that the Respondent refused to comply with the contract was not only not coercive, but rather must have been welcomed by the employees as it comported with their sentiments. Accordingly, there seems to be no compelling reason for having deprived them of their right to vote.

[20] See *Levitz Furniture Co.*, 333 NLRB 717, 729 (2001), "Act's fundamental principles of encouraging collective bargaining and effectuat-

their right to decertify or dismiss the Union; and that, therefore, instead of the employees getting rid of the Union, it should be the other way around so that the Union, with the assistance of the Board, may effectuate the termination of the employees.[21]

I do not think this is a reasonable solution to the problem. Indeed, in my opinion it would be difficult to construct a more compelling scenario warranting the Board's intervention and exercise of its expertise in dealing with a matter that is first and foremost "representational" in the purest form: the fundamental issue continues to be, as it has been from the beginning, whether or not the employees choose to be represented by the Union; the contractual issue is dependent upon this choice.

The Board's policy in *Tampa Sheet Metal*, 288 NLRB 322, is particularly suited to give priority to the representational issue by permitting employees the right to select or refrain from selecting a collective-bargaining representative.[22] Thus, consistent with the holding of *Tampa Sheet Metal*, the Board should dismiss the Union's charges that the Respondent had violated Section 8(a)(5) of the Act by repudiating the agreement imposed through interest arbitration, and, there being no blocking charges preventing the holding of an election, the employees should then be permitted to exercise their right to vote. As noted above, this is what the Regional Director was attempting to do when, on August 30, 2000, he dismissed the Union's charge. I find, under the circumstances, that enfranchisement of the employees, not their termination, remains the proper approach consistent with the fundamental purposes of the Act.

Accordingly, having given careful consideration to the decision of the district court and the arguments of counsel, I recommend that the Board not defer to the order of the district court, that the complaint be dismissed in accordance with the Board's policy in *Tampa Sheet Metal*, and, further, that the Board direct the Regional Director to forthwith process the petition in Case 17–RD–1506 so that the underlying representation issue may be finally resolved.[23]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[24]

ORDER

The complaint is dismissed in its entirety**.**

ing employee free choice."; and, at 731: "The Board and the courts have consistently said that Board elections are the preferred method of testing employees' support for unions."

[21] Neither the Union nor the General Counsel has cited any case where the Board has ever required that an employer terminate an employee in an 8(f) situation.

[22] The Board's preference for giving priority to representational issues over contractual and other competing issues is exemplified by its decisions in *City Markets, Inc.*, supra, *Nu-Aimco, Inc.*, supra, *and Levitz Furniture Co.*, supra.

[23] As a result of this conclusion, I deem it unnecessary to address many of the arguments made by the Respondent in its brief.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.